Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-917

WHITESIDE & COMPANY, ET AL
Petitioners
vs.
NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC.
and
THE SECURITIES AND EXCHANGE COMMISSION
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Themselves
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APPENDIX (CITATIONS)

SEC — SECURITIES AND EXCHANGE COMMISSION
NASD — NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

(a) No. 76 - 3318 (SEC No. 12656), August 18, 1977, Judgment, Fifth Circuit Court of Appeals
(b) Per Curiam, August 18, 1977, Decision, Fifth Circuit Court of Appeals, West Publishing Co., pages 5335 - 5339, (Matter of Record.)
(c) Amended Motion, Petitioner, Filed, 1/11/77, Relief of Sanctions, Fine and Costs from National Association of Securities Dealers, Inc.
(d) No. 76-3318, October 31, 1977, Review, Fifth Circuit Court — DENIED
(e) No. 76-3318, September 23, 1977, Review, Fifth Circuit Court — DENIED
(f) NASD, Article III, Section 1, Rules of Fair Practice, Manual, Par. 2151 - 2152
(g) NASD, Decision, September 22, 1975, Board of Governors
(h) NASD, Decision, February 7, 1975, Dist. No. 6, Business Conduct Committee
(i) SEC, Release No. 9856, Rule 15c3-3 (e) (3), page 15 (The Release is Matter of Record)
(j) SEC, Release No. 9856, Rule 15c3-3 (e) (g), page 16 (The Release is Matter of Record)

(k) SEC, Release No. 17056/April 26, 1974, page 2 (The Release is Matter of Record)
(l) SEC Release No. 9856, Rule 15c3-3, Exhibit A, pages 21 and 22, Formula
(m) Petitioner's Withdrawal Computation made July 11, 1974 as of 7/10/74
(n) Petitioner's Deposit, 7/11/74 per Computation 7/09/74 as of June 28, 1974 less Withdrawal Computation (m) for a Net of $22,228.22
(o) SEC Release, No. 12565/June 22, 1976, Rule 15c3-3 Interpretation (Matter of Record)
(p) SEC Release No. 12656/June 22, 1976, Dismissing to NASD (Matter of Record)

REGULATORY PROVISIONS INVOLVED

1. SEC Release No. 9856, Rule 15c3-3/November 10, 1972, Appendix (i) (j)
2. SEC Release No. 10756/April 26, 2974, Appendix (k)
3. SEC Release No. 12565/June 22, 1976, Appendix (o)
4. SEC Release No. 12656/June 22 1976, Appendix (p)
5. NASD Manual, Article III Section 1 and 2, Appendix (f)

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals, August 18, 1977, No. 76-3318, Summary Calendar, Per Curiam, pages 5335-5339 is a matter of record. (Appendix (b)

The opinion of the Fifth Circuit Court of Appeals in respect to motion of petitioner to dismiss with prejudice, Fine, Censure, and Sanctions by the National Association of Securities Dealers, Inc., a private corporation, with reasonable costs to petitioners has not been acted upon. Appendix (c)

A rehearing of the August 18, 1977 opinion was denied September 23, 1977.

A rehearing of the August 18, 1977 opinion was again denied October 31, 1977. Copies of the above included. Appendix (d) and (e)

Securities and Exchange Commission (SEC) opinion is in SEC Release No. 12565/June 22, 1976 and was dismissed (returned to NASD) in SEC Release No. 12656/ June 22, 1976. Matters of Record. Appendix (o) and (p)

National Association of Securities Dealers, Inc. (NASD) Decisions were District No. 6, February 7, 1975 and Board of Governors, September 22, 1975. Appendix (g) and (h)

JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. Section 1254.

The interpretation of SEC Rule 15c 3-3 (Release No. 9856) is of national importance to thousands of security dealers, a most important industry, and the time of the U.S. Supreme Court is warranted. This is the first interpretation of this Rule 15c 3-3, no previous record.

This writ of certiorari is filed for clarification that the Fifth Circuit did not properly inquire that the "findings

of the NASD Decisions were supported by substantial and convincing evidence."

This writ of certiorari is filed for clarification that Fifth Circuit did not properly inquire that the "findings of the Commission were supported by substantial and convincing evidence."

QUESTIONS PRESENTED FOR REVIEW

NASD QUESTIONS

1. Judgment, August 18, 1977, Appendix (a), was in regard to SEC Release No. 12656/June 22, 1976, Dismissing to NASD Tex No. 248, Appendix (p). Dated January 11, 1977 Petitioners Filed with Fifth Circuit, a First Amended Motion, Relief of Sanctions, Fines and Costs: National Association of Securities Dealers, Inc. with a supporting Brief, Appendix (c). Is it in the responsibility of Fifth Circuit to reach a Decision on the merits of the allegations of the NASD, Tex No. 248, its position of Penalties in respect to Rule 15c3-3, or is Petitioner to pray relief in a U. S. District Court for ascertaining facts and relief of Penalties under Court procedures?

2. Is the operation of SEC Rule 15c3-3 an internal one for the broker-dealer involving the setting aside of cash resources out of Net Capital in a co-mingled Special Bank Account for the Benefit of Customers not involving "principles of trade" with a customer who is probably unaware of such a bank account, Appendix (f)?

3. Does the NASD have rights of "Penalty" (Censure, Fine and Costs) court procedures not provided in Rule 15c3-3 (SEC Rel. No. 9856) even for the SEC much less a private corporation as NASD, Appendix (h)?

SEC QUESTIONS

4. The following statement in a NASD Brief, Pg. 14 NASD Brief to the SEC, Feb. 20, 1976 and confirmed by the SEC is false according to the actual wording of the Rule 15c3-3 (e) (3) page 15 Appendix (i), namely, "The required deposit to the Special Reserve Bank account must be made no later than one hour after the opening of banking business on the second business day following the last day of the month." Does the actual wording of the Rule mean that Computations should be made **at** or **on** last day of month or **as of** on some subsequent day as stated in the Rule, Appendix (i)?

5. Is it improper to take an **as of** Computation for June 30, 1974 made when possible to do so on July 9, 1974, and move it to June 30, 1974 as an **at** Computation with required deposit allegedly due July 2, 1974 (not possible or required by the wording of the Rule), but timely made July 11, 1974, and render a Decision of Non-Compliance, Appendix (h)?

6. Is SEC Release No. 10756/April 26, 1974 page 2, Appendix (k) valid in that the Midwest Stock Exchange Clearing Corporation Reports from Chicago are from Petitioner's most important correspondent involving cash receipts and disbursements of Customers and according to such Release Petitioner had 24 hours posting time after reception?

7. Is Rule 15c3-3 so ambiguous, discriminating toward a small, beginning broker-dealer, violating Fair Trade and Competitive Acts of Congress from the Clayton Acts forward, that it is unenforcible under conditions of clear and convincing application, Appendix (l)?

8. Is SEC Release No. 12565/June 22, 1976, last par. IV page 5, namely: "This is the first case in which we

have interpreted the provisions of Rule 15c3-3. In view of this and other circumstances, we shall exclude this aspect of the case from consideration in determining whether the sanctions imposed by the NASD are excessive" fair notice and disclosure to the Petitioners, Appendix (o)?

9. Is it the province of Fifth Circuit and SEC to ascertain the truth of alleged facts and accusations falsely made? (Reference: Collins Securities Corporation et al v. Securities and Exchange Commission, U.S. Court of Appeals, District of Columbia, No. 75-2200)

10. Is not the withholding of Examination Reports from the Examined a violation of the Freedom of Information Acts?

STATEMENT OF THE CASE

In June, 1974 Petitioner was (and continues) a stock and bond Broker-Dealer operating as a partnership in Lubbock, Texas, a member of the Midwest Stock Exchange (MSE) and Midwest Clearing Corporation (MCC) in Chicago, Ill. and the National Association of Securities Dealers, Inc. (NASD) with supervision responsibility from MSE as per Securities and Exchange Commission (SEC) designation.

Saturday, July 6, 1974, necessary Activity Reports Packet for Friday, June 28, 1974, came via Air Mail from MCC, which are ordinarily two to four days delayed in arriving, came to Petitioner's Post Office July 6 and in Petitioner's office Monday July 8, 1974. (Holidays: June 29, 30, July 4, 6, 7). After postings July 8, 1974, and all night, Rule 15c3-3(e)(3) page 15, monthly, as of June 28, 1974, Computation was made July 9, 1974. Also on July 9, 1974, the Monthly Form "M"

Report as of close of June, was compiled for 10th of month requirement of NASD and 10th business day (July 15) for MSE. Truthfully so, it was checked that Rule 15c3-3(e)(3) Computations required Deposit (due before 10 a.m. July 11, 1974) had not been made. Before 10 a.m. July 11, 1974 a required Deposit of $37,923.56 as of June 28, 1974 was made less a Withdrawal of $15,695.34 as per **as of** July 10, 1974 Withdrawal Computation, Appendix (m), making a Net Deposit of $22,228.22, Appendix (n), curing the situation.

A special NASD Examination was made by a Mr. Watkins the last of July 1974, whose Report was never made available to Petitioners. A Summary Complaint, rejected, and a Formal Complaint was issued by the District Committee as Complainant, Oct. 31, 1974, based on the allegations that (1) Computations made July 9, 1974 was really **at** June 30, 1974 (June 28, 1974 last business day of month) and that "Respondents failed to take appropriate steps after its initial computation at June 30, 1974," and (2) "the Committee — does not believe Respondents have taken all possible action to avoid Rule violations . . . evidenced by the fact that after Respondents were able to compute the reserve requirement at . . . June 30, 1974, the additional required deposit . . . was not made even though Respondents had sufficient funds to make them." Appendix (h).

Regardless of convincing and detailed evidence by Petitioners that **as of** Computation for June 28, 1974 was made on July 9, 1974 when possible to do so and not **at** June 30 (June 28, 1974) which is impossible, before the NASD District Committee, NASD Board of Governors (who added that MCC Reports were not necessary — disputed by SEC), the SEC and Fifth Circuit — all have

improperly held to the contrary even in violation of Rule 15c3-3(e)(3) page 15, Appendix (i) and SEC Release No. 10756/April 26, 1974, page 2, Appendix (j), both of which have been ignored at all levels.

Petitioner has found no appeal hearing Decision willing to investigate the false statements of the Dist. No. 6. Committee Decision or claim any power to correct, being content to repeat and compound them. Petitioner feels the Fifth Circuit, the first court of hearing has the responsibility of determining "substantial and convincing evidence."

SUMMARY OF ARGUMENT

(1) Take a Rule 15c3-3(e)(3) Computation made July 9, 1974, **as of** June 30, 1974, (according to the Rule) when it was possible to make one, and move it back improperly by Decision, Tex 248, February 7, 1975, to an "**at** Computation June 30, 1974, instead of **as of,** ruling violation for not making a Deposit July 2, 1974 (by 10 a.m. of the second day thereafter; (2) then ruling "bad faith" and "willful" violation for not making a Deposit on July 11, 1974 after Respondent was able to make a Computation (when Respondent did make the required Deposit, July 11, 1974); (3) Penalize by Censure, Fine and Costs Respondent for "acts . . . contrary to high standards of commercial honor and inconsistent with just and equitable principles of trade" when no trade was involved or "a customer harmed"; and, (4) Board of Governors ruling that Midwest Stock Exchange Reports were unnecessary as Respondent is responsible for keeping all records necessary for Compliance regardless of Clearing Corporation Activity Reports — and you have the falsification in summary of the charges made against Petitioners — to be sure not "clear and convincing evidence" required at all levels of Appeal made by Petitioners according to Administrative Laws.

ARGUMENT

This is the first case of interpretation of SEC Rule 15c 3-3 by the SEC. Like others this is first disclosure to Petitioner.

As usual Petitioner made a monthly Formula Computation as per Rule 15c 3-3 (e)(3) Page 15 when data was available on **as is** basis (as is any Balance Sheet) as called for by the Rule. Petitioner was dependent on Midwest Stock Exchange Clearing Corporation (MCC) for cash (via telephone) and activity (via Air Mail) reports for end of month of June (June 28, 1974), received in Petitioner's office Monday, July 8, 1974, because of delay of operation of MCC and Air Mail delay. Five holidays intervened, two Fridays and Saturdays plus July 4 (Thursday). Absenteeism in MCC and others must be the trouble as end of June reports have been delayed two days for cash reports and four to eight days for activity reports every year 1974, '75, '76 and '77.

The Rule 15c 3-3 (c)(3) ignored by all Decisions, anticipated these delays placing computations on **as is** basis. Not only delays would be in the framework of that which is possible but SEC Release No. 10756/April 26, 1974 page 2 "Time Lag in Transmission of Data," ignored by all Decisions, provides for accounting for these extraordinary delays - reception plus 24 hours posting time. This would give Petitioner to July 9, 1974 to record. Petitioner, as per usual custom, made the computation as of June 28, 1974 on July 10, 1974, when Form M Monthly Report due as per Release No. 10756 no later than 10 business days after the close of month. MCC is not a bookkeeping Service Bureau.

The NASD and SEC has held that the Rule meant that Computations must be made **at** or **on** June 28, 1974 not

only an impossibility but is not Rule 15c 3-3 (e)(3) page 15 dictated. Furthermore Petitioner's Computation **as of** June 28, 1974 made on July 10, 1974 was improperly and falsely taken as **at** June 28, 1974 requiring a Deposit of the needed amount July 2, 1974 days before Petitioner knew of what amount was required.

NASD, Board of Governors, endorsed by SEC, that MCC data was not necessary for Computation purposes, a contradiction of SEC Release No. 12565/June 22, 1976 and the Rule 15c 3-3 (e)(3) itself (**as of** basis) and an improper attempt to establish Computation time **at** or **on** end of month.

The NASD District 6 Decision, February 7, 1975 recognizing the necessity of MCC Data and its delay held that "even after Respondents (the Petitioner) were able to make the Computation" Respondent did not make Deposit but the Petitioner did deposit on July 11, 1974 the requisite Deposit (even a day earlier than required) as shown in Appendix (m) (n) SEC Appendix, Fifth Circuit, pages 066 and 067 and recognized on page seven of the Decision that deposit was made.

Not to be outdone the SEC, which should be upholding its reputation for truth in reporting, suggested that compliance was so important that an extra deposit like $100,000 to take care of any potentiality should be kept in the Special Reserve Deposit for the Benefit of Customers. In other words, a fictitious Cash Reserve of $100,000 or less for Customer Cash Liabilities should be kept (an extra 5% in Formula is of doubtful validity in the face of other might be creditors). (SEC Brief to Fifth Circuit, page 26; 37).

Rule 15 c 3-3 does not provide for a violation penalty. For the NASD to apply a "Penalty" for a non-trade

alleged infringement is not the meaning or intention of Article III, Section 1, and is improper. Rule 15c 3-3 (e)(3) application which is an internal net, co-mingled, cash reserve set aside in a special Bank Account, does not involve a particular customer or broker trade. No customers were harmed. (Ref. 7/07/76 De Felice and Associates, Charlotte, North Carolina were "no Investors were harmed").

In the working of the Formula of Rule 15c 3-3 a definite Cash Deposit in a Special Reserve Bank Account for co-mingled Customer Cash Liabilities is made out of Net Capital Cash. After the payment out of other Cash Resources in the liquidation of these liabilities then cash from the Special Reserve Account can be retrieved. This is double "jeopardy" for a "single" liability, i.e. the Customer Cash Liability. Unrestricted Cash as a Debit is conspicuous by its absence in the Formula. Allowing exclusive use of Customer Cash Liability in fact by investment in "safe area" of Margin Accounts is neither "liquid" or "safe" but is a decided discrimination in favor of the existing broker with large investment in Margins and allows such a broker "free use of customer cash liabilities." This is a decided elimination of the beginning broker without a "built up" margin account.

The wordings of Note A and Note B in Formula are not understandable.

The intention of Rule 15c 3-3 to inhibit the beginning broker to be (1) fully disclosed through another broker or (2) carry no Margin Accounts is an illegal competitive restriction. Under the guise of protecting customer liabilities it is really a restriction of the growth of the broker who has insufficient margin accounts. The broker with large margin accounts has no deposit requirement,

no worry of Rule 15c 3-3 and gets free use of the customer liability funds.

There was no Computation at or on June 28, 1974, or any other end of month, and cannot be made, no Deposit Balance requirement of $52,854 on July 2, 1974 (SEC Release No. 12565/June 22, 1976, V, page 5) (Per Curiam (1) page 5337, third paragraph) NASD Decision February 7, 1975, Tex-248). If Rule 15c3-3 (e)(3) page 15 means that Computations should be made on or at the last day of the month, then Petitioner should have been held in violation of **No** Computation and **No** Deposit instead of being held in violation of a Deposit Balance of $52,854 arrived on an **as is** basis, July 9, 1974, after data was available. In other words, it is improper to take an **as of** Computation (July 9, 1974) and move it back to June 28, 1974, for a Decision of violation on an **at** basis. **No Computation violation was ever alleged.**

It is clearly shown that no re-computation was made on July 11, 1974, but one for Withdrawal Purpose, as of previous day, (Rule 15c 3-3 (g) page 16) and a Net Deposit of $22,228.22 was made.

The question of misstatements of facts is a serious question, at least 13 misstatements in SEC Release No. 12565/June 22, 1976 and repeated in Fifth Circuit Court Judgment, Per Curiam, Aug. 18, 1977.

1. Customers' cash prepayments before Settlement Dates were for Confirmations issued and Purchases already made and not for payments for Purchases to be made, or "subsequent purchases." (Per Curiam page 5336, 6-55)

2. Purchases have to be made, Settlement Dates established, and Settlement Date passed in order that "customer's securities failed to receive" accrue. Customer

"prepayments were not" fails. (Per Curiam page 5339, 4.)

3. If Rule 15c3-3 is regulatory, not penal (Per Curiam, page 5338, 3) how can NASD, in absence of court action, assess "Penalty."?

4. No trade practice is involved in the operation of Rule 15c3-3 in setting aside an internal reserve.

5. Petitioners made the **as of** Computation on July 9 as per Rule never "conceded a failure to make the June computation at June 30 or 28th as their own fault." (SEC Release No. 12565, VI)

6. When Petitioners did make the timely computation on July 9 as of June 30, they did deposit timely on July 11 the required deposit and immediately Withdrew as per Computation as of July 10, 1974 to leave a Net increase in Deposit of $22,228.22.

7. Petitioners never sought to excuse any of its operations because of absence of or operation of subordinate personnel.

8. Petitioners were never aware of the "warnings" allegedly given or stated they were "toying around with the twenty-four hour rule" or "ignore in certain respects the requirements of 15c3-3 (e) and (i)" or "given the **attitude** of applicants, the institution of formal disciplinary proceedings and imposition of penalties are fully necessary" or "they could have made a deposit to cover estimated requirements" or "they could easily have gotten it (MCC data) faster," "telecopier facilities, private express delivery or telephone communication from an agent in Chicago" all of which were not available to Petitioners.

9. The demands are incorrectly based on the assumption that the Rule 15c3-3(e)(3) reads "at or on" end of

month when it states "as of."

10. Petitioner did not send notice of its failure to make required deposit and none was needed as Petitioner timely made Computation and Deposit regardless of all that is written improperly to the contrary.

11. Petitioner is informed there is no Record of the Hearing before the SEC May 11, 1976 and the Reporter of the Jan. 7, 1975 "Hearing" before Dist. 6 NASD Committee states he has no copy available.

12. Petitioners found it impossible to follow NASD dictation that the Rule required Computations at or on June 30, 1974, even make retroactive deposit requirement, July 2, 1974, either as a matter of possibility or existing Rules and Releases. The same for the SEC. Furthermore, NASD and SEC, insistence of inclusion of proprietary accounts in Formula, as proprietors are not customers, was the source of "corrected" computation figures for June 30, 1974 and other months.

13. Petitioner wishes to be heard. Decisions have no likeness of "Hearings" held. Incorrect statements are made and repeated, compounded, questions not answered. Petitioner is quoted as against Customer Protection. Rule 15c3-3 does not provide that. Nobody understands the Rule. The SEC wrote the Rule, judges through its Staff the so-called interpretation of the Rule. In this case the interpretation is not what the Rule states and ignores its own Rule and Releases and is the sole interpreter, leaving out facts, misstatement of evidence to its choosing, even to the point of lack of professional integrity and responsibility — violating the moral standards the SEC expects of others.

CONCLUSION

For the foregoing reasons, plus the basis of "clear and convincing evidence" in the recent Collins Securities Corporation et al v. Securities and Exchange Commission, U.S. Court of Appeals, District of Columbia No. 75-2200, Petitioner, Whiteside and Company and Clarence K. Whiteside and William H. Whiteside, request that a Writ of Certiorari be issued to the Fifth Circuit Court of Appeals, New Orleans, Louisiana as presented.

Respectfully submitted,

WHITESIDE AND COMPANY, Petitioner

Clarence K. Whiteside, Partner

William H. Whiteside, Partner

Copies to:

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APPENDIX (a)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term 1976

No. 76-3318

SEC No. 12656

WHITESIDE AND COMPANY, CLARENCE K. WHITESIDE and WILLIAM H. WHITESIDE,

Petitioners

versus

SECURITIES AND EXCHANGE COMMISSION, Washington, D. C.

Respondent

Petition for Review of An Order of
the Securities and Exchange Commission (Texas Case)

Before THORNBERRY, RONEY and HILL,
Circuit Judges.

JUDGEMENT

This cause came on to be heard on the petition of Whiteside and Company, Et. Al. for review of an order of the Securities and Exchange Commission, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Securities and Exchange Commission in this cause be, and the same is hereby affirmed.

Issued as Mandate: August 18, 1977

APPENDIX (b)

WHITESIDE & COMPANY et al., Petitioners, 5335
v.
SECURITIES AND EXCHANGE
COMMISSION, WASHINGTON, D.C., Respondent
No. 76-3318
Summary Calendar.*
United States District Court,
Fifth Circuit.
Aug. 18, 1977

A broker dealer filed petition for review of an order of Securities and Exchange Commission which affirmed the imposition of disciplinary sanctions by the National Association of Securities Dealers, a self-regulatory organization. The Court of Appeals held that: (1) Court of Appeals review was limited to question of whether Commission's decision that broker dealer had violated rules of fair procedure of the Association was supported by substantial evidence and whether the Commission decision finding that Association sanctions were not excessive was arbitrary; (2) substantial evidence supported finding that broker dealer violated Commission rule, and consequently rules of fair practice of Association, by failure to make a required deposit in a special reserve account following computation of a new credit balance and subsequent failure to immediately notify the Commission, the Securities Investor Protection Corporation and other regulatory bodies by telegram, and (3) notwithstanding that Commission recognized that excuses expounded by broker dealer were mitigating factors in consideration of sanctions to be imposed, conclusion that sanctions were appropriate was not arbitrary or an abuse of discretion in light of fundamental nature of the reserve account system to the safeguarding of customers' funds. Affirmed.

Adm. Office, U.S. Courts - West Publishing Company,
Saint Paul, Minn.

APPENDIX (c)

No. 76-3318

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Whiteside & Company, Clarence K. Whiteside and
William H. Whiteside
Appellants/Petitioners
v.
Securities and Exchange Commission
and
National Association of Securities Dealers, Inc.
Appellees/Respondents

Petition for Review of Orders:
Securities and Exchange Commission,
Washington, D.C.
Release No. 12656 - June 22, 1976
Release No. 12565 - June 22, 1976
National Association of Securities
Dealers, Inc., Washington, D.C.
NASD, Decision, September 22, 1976
(NASD Committee Dist. 6, Tex.
248, Decision February 7, 1975)

Petition Filed: 8/18/76; Brief Filed: 10/26/76; Reply Brief to SEC

First Amended Motion:
Relief of Sanctions, Fines and Costs:
National Association of Securities Dealers, Inc.,
Washington, D.C.

ON BEHALF OF
WHITESIDE & COMPANY, PARTNERS:
Clarence K. Whiteside
William H. Whiteside
Appellants

Of Counsel:
Themselves

Date 1/11/17

APPENDIX (d)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3318

WHITESIDE AND COMPANY,
CLARENCE K. WHITESIDE and
WILLIAM H. WHITESIDE,

Petitioners,

versus

SECURITIES AND EXCHANGE
COMMISSION, Washington, D.C.,

Respondent.

Petition for Review of an Order of the
Securities and Exchange Commission
(Texas Case)

Before THORNBERRY, RONEY and HILL,
Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for relief of sanctions, fines and costs is denied.

Filed Oct 31 '77

APPENDIX (e)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-3318

WHITESIDE AND COMPANY, CLARENCE K.
WHITESIDE and WILLIAM, H. WHITESIDE,

Petitioners,

versus

SECURITIES AND EXCHANGE
COMMISSION, Washington, D.C.,

Respondent.

Petition for Review of an Order of the Securities and
Exchange Commission
(Texas Case)

ON PETITION FOR REHEARING
(September 23, 1977)

Before THORNBERRY, RONEY and HILL,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

James C. Hill
United States Circuit Judge

APPENDIX (f)

NASD Manual

ARTICLE III

Rules of Fair Practice

¶2151 Business Conduct of Members

Sec. 1. A member in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.

. . . Cross References

"Filing of Misleading Information as to Membership or Registration" ..... ¶ 1104
"Failure to Register Personnel" ..... ¶ 1622
"Fair Dealing with Customers" ..... ¶ 2152

¶2152 Recommendations to Customers

Sec. 2. In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

APPENDIX (g)

NASD, Decision, Sept. 22, 1975, Board of Governors
(Concluding Statement)

We have carefully considered the entire record in this matter, including the testimony of respondent, his brief and other correspondence, and we believe that the findings and penalties of the District Committee are proper. We cannot accept the contention that mail delays interfered with the member's ability to comply with Rule 15c3-3. It is our belief that it is the responsibility of every member to make and keep whatever records are necessary for compliance, and whatever delays or difficulties there may be as a result of the operations of outside organizations, such as clearing corporations, do not relieve members of this responsibility. Compliance with the provisions of the Commission's customer protection rule (15c3-3) is of paramount importance for all Association members. Accordingly, we hereby affirm the findings of violations, the penalties imposed, and the costs assessed by the District Committee. In addition, we assess costs of this appeal in the amount of $791.85, jointly and severally, upon respondents.

On Behalf of the Board of Governors,

By Thomas D. Walsh, Secretary

APPENDIX (h)

NASD, Decision Complaint No. Tex - 248, FEB. 7, 1975

SEC Rule 15c3-3(e)3 requires that a broker-dealer making monthly computations under the rule must make the computation **as of** the close of the last business day of the month and if a deposit is required that it be made no later than one hour after the opening of banking business on the second following business day.

It is obvious that Respondents failed to observe these requirements after its January, May and June, 1974 computations. Only after the Association contacted Respondents on July 11, 1974* did they take action by making a subsequent computation and a deposit;* however as discussed earlier in the Decision, Respondents failed to take appropriate steps after its initial computation at June 30, 1974.

The Committee finds Respondents violated Article III, Section 1 of the Rules of Fair Practice as charged.

The Committee further finds Respondents acts to be contrary to high standards of commercial honor and inconsistent with just and equitable principles of trade.

PENALTIES

In assessing a penalty, the Committee has considered the fact that Respondents have been cautioned on at least two prior occasions, including one letter of caution, of its failure to make required deposits. Although the Committee is cognizant of Respondent Member's problem in obtaining prompt record keeping information

*A deposit as of June 30, 1974 less Withdrawal **as of** close of July 10, 1974 for a Net Deposit of $22,228.32 was made. SEC Appendix to Fifth Circuit pages 066 and 067. (Petitioner's explanation)

from the Midwest Stock Exchange because of mail delays, it does not believe Respondents have taken all possible action to avoid Rule violations with respect to SEC Rule 15c3-3. This is evidenced by the fact tht even after Respondents were able to compute the reserve requirement at January 31, May 31 and June 30, 1974, the additional required deposits were not even made though Respondents had sufficient funds to make them.*

Therefore, it is the decision of this Committee that Respondents Whiteside & Co., Member, Clarence K. Whiteside and William H. Whiteside, Registered Principals, be censured, fined $1,000 and assessed costs, jointly and severally.

COSTS

Hearing Expenses	$381.91
Printing of Decision	55.00
Total	$436.91

DISTRICT BUSINESS CONDUCT COMMITTEE FOR DISTRICT NO. 6

By: Wm. Stewart Storie, Chairman

APPENDIX (i)

SEC Release No. 9856 (Rule 15c3-3)(e)(3) Page 15

(3) Computations necessary to determine the amount required to be deposited as specified in paragraph (e)(1) shall be made weekly, as of the close of the last business day of the week, and the deposit so computed shall be made no later than one hour after the opening of banking business on the second following business day; provided, however, a broker or dealer which has aggregate indebtedness not exceeding 800 per centum of net capital (as defined in Rule 15c3-1 or in the capital rules of a national securities exchange of which it is a member and exempt from Rule 15c3-1 by subparagraph (b)(2) thereof) and which carries aggregate customer funds (as defined in paragraph (a)(10)), as computed at the last required computation pursuant to this rule, not exceeding $1,000,000, may in the alternative make the computation monthly, **as of** the close of the last business day of the month, and, in such event, shall deposit not less than 105 per centum of the amount so computed no later than one hour after the opening of banking business on the second following business day.

APPENDIX (j)

SEC Release No. 9856, Rule 15c3-3(e)(g) page 16

(g) Withdrawals from the Reserve Bank Account.

A broker or dealer may make withdrawals from his Reserve Bank Account if and to the extent that at the time of the withdrawal the amount remaining in the Reserve Bank Account is not less than the amount then required by paragraph (e). A bank may presume that any request for withdrawal from a Reserve Bank Account is in conformity and compliance with this paragraph (g). On any business day on which a withdrawal is made, the broker or dealer shall make a record of the computation on the basis of which he makes such withdrawal, and he shall preserve such computation in accordance with Rule 17a-4.

(h) **Buy-In of Short Security Differences.**

A broker or dealer shall within 45 calendar days after the date of the examination, count, verification and comparison of securities pursuant to Rule 17a-13 or otherwise or to the annual report of financial condition in accordance with Rule 17a-5, buy-in all short security differences which are not resolved during the 45 day period.

(i) **Notification in the Event of Failure to Make a Required Deposit.**

If a broker or dealer shall fail to make in his Reserve Bank Account or Special Account a deposit, as required by this rule, the broker or dealer shall by telegram immediately notify the Commission, the Securities Investor Protection Corporation, and the regulatory authority for the broker or dealer, which examines such broker or dealer as to financial responsibility and shall promptly thereafter confirm such notification in writing.

APPENDIX (k)

SEC Release No. 10756/April 26, 1974, page 2

Trial Balances and Capital Computation

Subparagraph (11) requires the monthly preparation of a trial balance of all ledger accounts and a computation of aggregate indebtedness and net capital as of the trial balance date. These records should be prepared no later than 10 business days after the end of the accounting period, except in those instances where the records must be prepared in a lesser period to satisfy any reporting requirements established by any self-regulatory authority of which the broker-dealer is a member. 8/

Other Records

The record of beneficial ownership of each cash or margin account (subparagraph (9) of Rule 17a-3) should be prepared before transactions are effected in an account. The employment questionnaire or application (subparagraph (12) of Rule 17a-3) should be prepared at or prior to the commencement of employment.

Time Lag in Transmission of Data

Under certain limited circumstances the accounting department of a broker-dealer may not be aware of a transaction until a few days after it occurs. Transactions such as receipts and disbursements in out-of-town branches or by correspondents should be recorded no later than the day after the transaction is reported to the accounting department, and dividend and interest claims from other brokers should be recorded no later than the day after the validity of the claim is established.

APPENDIX (l)

FORMULA FOR DETERMINATION
of
RESERVE REQUIREMENT FOR BROKERS
AND DEALERS

Under Rule 15c3-3

	Credits	Debits
1. Free credit balances and other credit balances in customers' security accounts. (See Note A)	$XXX	
2. Monies borrowed collateralized by securities carried for the accounts of customers.	XXX	
3. Monies payable against customers' securities loaned.	XXX	
4. Customer's securities failed to receive.	XXX	
5. Credit balances in firm accounts which are attributable to principal sales to customers.	XXX	
6. Market value of stock dividends, stock splits and similar distributions receivable outstanding over 30 calendar days.	XXX	
7. Market value of short security count differences over 30 calendar days old.	XXX	
8. Market value of short securities and credits (not to be offset by longs or by debits) in all suspense accounts over 30 calendar days.	XXX	

Note A

Item 1 shall include all outstanding drafts payable to customers which have been applied against free credit balances or other credit balances and shall also include checks drawn in excess of bank balances per the records of the broker or dealer.

	Credits	Debits
9. Market value of securities which are in transfer in excess of 40 calendar days and have not been confirmed to be in transer by the transfer agent or the issuer during the 40 days.	$XXX	
10. Debit balances in customer's cash and margin accounts excluding unsecured accounts and accounts doubtful of collection. (See Note B.)		$XXX
11. Securities borrowed to effectuate short sales by customers and securities on customers' securities failed to deliver.		XXX
12. Failed to deliver of customers' securities not older than 30 calendar days.		XXX
	Total Credits	Total Debits
	$_____	$_____
13. Excess of total credits (sum of items 1-9) over total debits	$_____	

(sum of items 10-12) required to be on deposit in the "Reserve Bank Account" (15c3-3 (e)). If the computation is made monthly as permitted by this rule, the deposit shall be not less than 105% of the excess of total credits over total debits.

Note B

(1) Debit balances in margin accounts shall be reduced by the amount by which a specific security (other than an exempted security) which is collateral for margin accounts exceeds in aggregate value 15% of the aggregate value of all securities which collateralize all margin accounts receivable; provided, however, the required reduction shall not be in excess of the amount of the debit balance required to be excluded because of this concentration rule. A specified security is deemed to be collateral for a margin account only to the extent it represents in value not more than 140% of the customer debit balance in a margin account.

(2) Debit balances in customers' cash and margin accounts included in the formula under item 10 shall be reduced by an amount equal to 1% of their aggregate value.

APPENDIX (m)

WITHDRAWAL COMPUTATION

DATE: 7/10/74

FORMULA FOR DETERMINATION OF RESERVE REQUIREMENT FOR BROKERS AND DEALERS UNDER RULE 15c3-3

	CREDITS	DEBITS
(1) Free Credit Balances and Other Credit Balances in Customers' Security Accounts.	30,900.55 1,564.93	
(4) Customers' Securities Failed to Receive.	39,624.88	
(10) Debit Balances in Customers' Cash and Margin Accounts excluding all Unsecured Accounts and Accounts Doubtful of Collection.		29,942.07 9,937.06
(12) Failed to Deliver of Customers' Securities not older than 30 days.		921.10
TOTALS	72,090.36	40,800.23

EXCESS of Total Credits over Debits	$31,290.13
RESERVE account Balance	9,061.91
DEFICIT/EXCESS	22,228.22

Check #01967, Dtd 7/11/74, Deposit in Lubbock National Bank Reserve Account.

APPENDIX (n)

TO THE CREDIT OF
WHITESIDE AND CO. - SPECIAL
1510 AVE L 747 0251
P O BOX 2956
LUBBOCK, TEXAS 79408

DEPOSITED IN
THE LUBBOCK NATIONAL BANK

Lubbock, Texas, 7/11, 1974

NOTICE – THIS DEPOSIT IS ACCEPTED ONLY ON CONDITIONS PRINTED ON COVER OF DEPOSIT SLIP BOOK, AND ON DEPOSITOR'S SIGNATURE CARD.

	Dollars	Cents
CURRENCY		
SILVER		
CHECKS AS FOLLOWS		
[illegible]		
[illegible]		
[illegible]		
[illegible]		
[illegible]		
[illegible]		
[illegible]		
Whiteside & Co Set	22228	22
TOTAL $	22228	22

:0720=858=6" :1:1111=12722:

APPENDIX (o)

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 12565/June 22, 1976

Admin. Proc. File No. 3-4790

In the Matter of the Application of

WHITESIDE & COMPANY
1510 Avenue L
Lubbock, Texas

and

CLARENCE K. WHITESIDE
WILLIAM H. WHITESIDE

For Review of Disciplinary Action Taken by the

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION
— REVIEW OF DISCIPLINARY PROCEEDINGS

Violations of Rules of Fair Practice

Failure to Make Appropriate Deposits in Special Account for benefit of Customers

Where member of registered securities association and its two partners failed to make required deposits in special account for the exclusive benefit of the firm's customers and did not send immediate telegraphic notice of those failures, association's findings of violation and sanctions imposed therefor **affirmed.**

APPEARANCES:

Clarence K. Whiteside, for applicants.

Lloyd J. Derrickson* and **John F. Mylod, Jr.,** for the National Association of Securities Dealers, Inc.

Review proceedings with respect to a decision dated September 22, 1975, by the Board of Governors of the National Association of Securities Dealers, Inc. Oral argument heard on May 11, 1976.

*Not present - Petitioner's statement

APPENDIX (p)

34-12565

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 12656/June 22, 1976

Admin. Proc. File No. 3-4790

In the Matter of the Application of

WHITESIDE & COMPANY
1510 Avenue L
Lubbock, Texas

and

CLARENCE K. WHITESIDE
WILLIAM H. WHITESIDE

For Review of Disciplinary Action Taken by the

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

ORDER DISMISSING REVIEW PROCEEDINGS

On the basis of the Commission opinion issued this daye, it is ORDERED that these review proceedings be, and they hereby are, dismissed. By the Commission.

Geroge A. Fitzsimmons
Secretary

Supreme Court, U. S.
FILED
MAR 8 1978
MICHAEL RODAK, JR., CLERK

No. 77-917

In the Supreme Court of the United States

OCTOBER TERM, 1977

WHITESIDE & COMPANY, ET AL., PETITIONERS

v.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. AND SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

WADE H. McCREE, Jr.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

DAVID FERBER,
Solicitor to the Commission,
MICHAEL K. WOLENSKY,
Assistant General Counsel,
VERNON I. ZVOLEFF,
Special Counsel,
Securities and Exchange Commission,
Washington, D.C. 20549.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77–917

WHITESIDE & COMPANY, ET AL., PETITIONERS
v.
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. AND SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*) is reported at 557 F. 2d 1118. The opinion and order of the Securities and Exchange Commission (Supp. App. 121–127) [1] are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1977 (Pet. App. A1). A petition for re-

[1] The Commission's opinion and order appear in the supplemental appendix filed by the Commission with the court of appeals, a copy of which has been lodged with this Court. This appendix will be cited as "Supp. App."

hearing was denied on September 23, 1977 (Pet. App. A5). The petition for a writ of certiorari was filed as of November 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondent National Association of Securities Dealers, Inc. ("NASD") properly imposed sanctions on petitioners for their failure to make timely deposits to their special reserve account for the benefit of customers, in violation of Securities Exchange Act Rule 15c3–3(e), and for their failure to provide immediate telegraphic notice of these omissions to the Commission, the Securities Investor Protection Corporation ("SIPC") and the appropriate regulatory authority, in violation of Securities Exchange Act Rule 15c3–3(i).

STATEMENT

Petitioner Whiteside & Company is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Securities Exchange Act of 1934, 48 Stat. 895, as amended, 15 U.S.C. 78*o*(b). Petitioners Clarence K. Whiteside and William H. Whiteside are the company's two registered principals. Respondent NASD is a self-regulatory securities association registered with the Commission pursuant to Section 15A(a) of the Act, as added, 52 Stat. 1070, and amended, 15 U.S.C. 78*o*–3(a). At all relevant times, the company has been a member of the NASD, and, since February 1, 1974, it has also been a member

of the Midwest Stock Exchange ("MSE"), a national securities exchange registered with the Commission pursuant to Section 6(a) of the Act, 48 Stat. 885, as amended, 15 U.S.C. 78f(a) (Supp App. 121, 123, n. 8).

Pursuant to its authority under Section 15(c)(3) of the Act, 15 U.S.C. 78*o*(c)(3), the Commission has promulgated Rule 15c3–3, 17 C.F.R. 240.15c3–3, entitled "Customer protection—reserves and custody of securities." Rule 15c3–3(e) requires every broker or dealer to establish a "Special Reserve Bank Account for the Exclusive Benefit of Customers." The purpose of this account is to ensure that each broker or dealer retains adequate funds to cover indebtedness to customers.

Under the rule, every broker or dealer must make periodic computations pursuant to a specified formula. Smaller brokers or dealers, such as petitioners, are permitted to make the computations on a monthly, rather than a weekly, basis. If the monthly computation shows a net credit balance, *i.e.*, if the broker or dealer owes customers more than they owe him, the broker or dealer is required to deposit in the special reserve account an amount sufficient to make the balance in that account at least 105 percent of the net credit balance.

If such a deposit is necessary, Rule 15c3–3(e)(3) requires that it be made no later than one hour after the opening of banking business on the second business day following the last business day of the month. If such a deposit is not timely made, Rule 15c3–3(i) requires the broker or dealer to give immediate tele-

graphic notice to the Commission, SIPC, and "the regulatory authority for the broker or dealer, which examines such broker or dealer as to financial responsibility * * *."

On October 31, 1974, the District Business Conduct Committee for NASD District No. 6 issued a complaint (Supp. App. 1–2) charging that petitioners had violated Rules 15c3–3(e) and 15c3–3(i). The complaint alleged that petitioners had not made special reserve account deposits required by computations performed at the end of January, May, and June 1974. The complaint further alleged that petitioners had not given the required notice of their failure to make the necessary deposits.[2]

After a hearing, the Conduct Committee determined that the charges in the complaint were justified. The Committee found that, although petitioners' own computations had shown that deposits were required under Rule 15c3–3, petitioners had failed to make the required deposits and had failed to give notice that necessary deposits had not been made (Supp. App. 70–80).

Petitioners argued that, while their original computations had indeed shown that deposits were required for January, May, and June 1974, subsequent corrections revealed that no such deposits were in fact necessary for the first two months at issue. With respect to the June 1974 deposit, petitioners explained that the failure to make the deposit in timely fashion (*i.e.*, by the morning of July 2, 1974) was attributable to the July 4th holiday and a short vacation taken by petitioner William Whiteside (Supp. App. 75).[3] Upon examination of the relevant figures, the Committee determined that the amounts of the neglected deposits were not as large as initially alleged in the complaint. Even so, the Committee found that petitioners had failed to make required deposits in excess of $10,000 for January 1974, $14,000 for May 1974, and $43,000 for June 1974.

The Committee did not accept petitioners' explanation for the delay in making the June 1974 deposit. The Committee concluded that petitioners had violated Rules 15c3–3(e) and 15c3–3(i), as well as Article III, Section 1 of the NASD's Rules of Fair Practice. (The latter provision states that, in the conduct of his business, an NASD member "shall observe high standards of commercial honor and just and equitable principles of trade.") After reviewing all the circumstances, the Committee decided that the appropriate

[2] With regard to the January 1974 deposit, petitioners should have notified the Commission, SIPC, and the NASD. With regard to the May and June 1974 deposits, petitioners should have notified the Commission, SIPC, and the MSE. When the company became a member of the MSE on February 1, 1974, the stock exchange replaced NASD as the regulatory authority charged with the task of examining petitioners' financial responsibility.

[3] After petitioners were contacted by NASD staff members on July 11, 1974, a new computation was performed, and the deposit required by that computation was made in petitioners' special reserve account. Because of a net decrease in petitioners' indebtedness to customers during early July 1974, the deposit necessary under the July 11 computation was approximately half the amount required by the computation performed as of June 30 (Supp. App. 75, 80, 125–126).

penalties for petitioners' violations were censure and a fine of $1,000 plus costs (Supp. App. 76–77).

On petitioners' appeal of the Committee's decision to the NASD Board of Governors (Supp. App. 81–92), a hearing was held before a subcommittee of the Board. Following that hearing, the Board affirmed the Committee's findings and the sanctions imposed. The Board also assessed the costs of the appeal against petitioners (Supp. App. 95–97).

Pursuant to Section 19(d) of the Securities Exchange Act, 48 Stat. 898, as amended, 15 U.S.C. 78s (d), petitioners appealed the Board's decision to the Commission (Supp. App. 98–103). After considering the parties' briefs and oral arguments and the record of the NASD proceedings, the Commission issued an Opinion and Order dismissing petitioners' appeal (Supp. App. 121–127). The Commission upheld the NASD's findings that petitioners had failed to make the necessary deposits for January, May, and June 1974 (Supp. App. 122–123). In response to petitioners' contention that revised computations indicated that no deposits were required for January and May, the Commission found that those computations were based upon an incorrect interpretation of Rule 15c 3–3 (Supp. App. 123–125).[4] Because its opinion in this

[4] Petitioners argued that customers' prepayments for securities not yet delivered need not be included among "cash liabilities" to customers. In rejecting this argument, the Commission referred to the detailed formula for special reserve account computations set forth in Exhibit A to Rule 15c3–3, 17 C.F.R. 240.15c3–3a. The Commission interpreted that formula to require that customers' deposits for the purchase of securities be regarded as liabilities to customers.

case represented its first opportunity to construe the rule's provisions, the Commission decided to exclude the first two omitted deposits from its consideration "in determining whether the sanctions imposed by the NASD [were] excessive" (Supp. App. 125).[5]

With respect to petitioners' failure to make the deposit required by their computation as of June 30, 1974, however, the Commission observed that petitioners themselves have "admit[ted] that * * * a substantial deposit in the special account was required" (Supp. App. 125), but that nevertheless, the deposit was not made and notice of the failure to make the deposit was not given until July 11, 1974. The Commission stated (Supp. App. 126):

> [Petitioners] concede that their failure to make the June computation on time was their own fault. More important is the fact that when they finally made the computation, they did not deposit the amount which a timely computation would have required. In these circumstances, the $1,000 fine imposed by the NASD cannot be considered "excessive or oppressive."

The court of appeals upheld the Commission's decision. The court found that petitioners had failed to make the deposits and to give the telegraphic notice

[5] Section 19(e)(2) of the Securities Exchange Act, 48 Stat. 898, as amended, 15 U.S.C. 78s(e)(2), provides that the Commission may reduce a sanction imposed by the NASD if the sanction "imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter or is excessive or oppressive."

256-405—78——2

required by Rule 15c3–3(i). It stated (App., *infra,* 7A):

> The SEC recognized in this case that the excuses expounded by petitioners were mitigating factors in the consideration of sanctions to be imposed. In light of the fundamental nature of the reserve account system to the safeguarding of customers' funds, however, the SEC concluded that the sanctions were appropriate. We cannot say that this conclusion was arbitrary or an abuse of discretion.

ARGUMENT

The decision below is correct and raises no issue of sufficient importance to warrant review by this Court.[6] The court of appeals correctly concluded (App., *infra,* 6A) that the Commission's "finding that petitioners violated SEC Rule 15c3–3 and, consequently, NASD's Rules of Fair Practice, is clearly supported in the record by substantial evidence." The censure and fine imposed as a penalty were neither arbitrary nor excessive.

The record shows that during a telephone conversation with NASD examiners on July 11, 1974, petitioners admitted that a required deposit to their special reserve account had not been made and that notice of their failure to make the necessary deposit had not been given to the NASD (Supp. App. 25–26, 36–37, 83, 86).[7] Petitioner William Whiteside testified at the hearing before the District Business Conduct Committee (Supp. App. 27): "Now, yes, we erred. I am not going to tell you we didn't err * * *." In addition, the telegram sent by petitioners to the regulatory authorities on July 11, 1974, confirmed that "[a]s of June 30, 1974, our reserve account should have had a balance of $59,291.28 instead of the actual $9,051.91 balance" (Supp. App. 65). Thus, the record supports the Commission's finding, affirmed by the court of appeals, that petitioners did not make a deposit to their special reserve account or give notice of their failure to do so until July 11, 1974,[8] nine days after the deposit should have been made.[9]

[6] Petitioners contend (Pet. 1) that this case presents issues of "national importance" because it "is the first interpretation of Rule 15c3–3." The Commission, however, expressly excluded from its review of the NASD sanction that aspect of the case that required interpretation of the formula set forth in the rule (Supp. App. 125). See p. 7, *supra.*

[7] The NASD's telephone call to petitioners was triggered by the NASD's receipt, on July 11, 1974, of petitioner Whiteside & Company's Form M for June 30, 1974. Form M is designed to alert the NASD to potential problems of its members, and the Form M received from petitioners on the date mentioned showed a required special reserve account balance of approximately $50,000 but an actual balance in that account of only $9,000 (Supp. App. 25–26, 69).

[8] On July 11, 1974, after they were contacted by the NASD staff, petitioners deposited not the amount required by their earlier computation as of June 30, 1974, but a lesser amount based on a recomputation of their net credit balance as of July 11, 1974 (Supp. App. 15). As the Commission observed, this procedure "permitted the firm to use $43,793 to which it was not entitled, during the early part of July" (Supp. App. 126). See note 3, *supra.*

[9] Petitioners assert (Pet. 3, 11) that under Rule 15c3–3(e), the time of the required computation is unclear. This argument ignores the essence of petitioners' violation, which was not the failure to make timely computations but the failure to make necessary deposits and give notice of that failure. Rule 15c3–3(e) does not require that the computation be done at a set time, but that the computation be made "as of" the last business day of the

Petitioners' violations of Rule 15c3–3 also constituted violations of Article III, Section 1 of the NASD's Rules of Fair Practice. This point is well established by Commission precedent. See *Barraco and Company,* 44 S.E.C. 539, 540–541; *Valley Forge Securities Co., Inc.,* 41 S.E.C. 486, 488; *Joseph Blumenthal,* 41 S.E.C. 133, 136. Petitioners argue (Pet. 2) that Article III, Section 1 should not encompass violations of Rule 15c3–3, because Rule 15c3–3 is "an internal [rule] for the broker-dealer * * * not involving 'principles of trade' with a customer who is probably unaware of such a bank account." As the court of appeals noted (App., *infra,* 7A), this contention overlooks "the fundamental nature of the reserve account system to the safeguarding of the customers' funds * * *." Cf. *Blaise D'Antoni & Associates, Inc.* v. *Securities and Exchange Commission,* 289 F. 2d 276, 277 (C.A. 5), certiorari denied (368 U.S. 899.

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month and that any deposit required pursuant to the computation be made not later than 1 hour after the opening of banking business on the second following business day. Accordingly, the computation may be performed at any time in the interim between the last business day of the month and the time by which the deposit is required, so long as it is completed in time for the deposit to be made in accordance with the rule.

Petitioners' repeated arguments (Pet. 4–5, 7–8, 10–11) that it was impossible for them to complete the computations in time to comply with the deposit requirements were considered and correctly rejected by both the Commission (Supp. App. 123–126) and the court of appeals (App., *infra,* 4A–6A). In any event, those arguments would not excuse petitioners' violations. Petitioners did not make the necessary deposits even after their computations were completed, and they completely ignored the notice requirement of Rule 15c3–3(i).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DAVID FERBER,
Solicitor to the Commission,
MICHAEL K. WOLENSKY,
Assistant General Counsel,
VERNON I. ZVOLEFF,
Special Counsel,
Securities and Exchange Commission.

MARCH 1978.

APPENDIX

WHITESIDE & COMPANY ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, W
D.C., RESPONDENT

No. 76–3318

Summary Calendar*

United States Court of Appeals, Fifth Circuit

Aug. 18, 1977

Rehearing Denied Sept. 23, 1977

Clarence K. Whiteside, pro se.
William H. Whiteside, pro se.

David Ferber, Sol. to SEC, Vernon I. Zvoleff, Atty., David J. Romanski, Asst. Gen. Counsel, Washington, D.C., for respondent.

Petition for Review of An Order Of the Securities and Exchange Commission (Texas Case).

Before THORNBERRY, RONEY and HILL, Circuit Judges.

On October 31, 1974, the District Business Conduct Committee No. 6 (the "Conduct Committee") of the National Association of Securities Dealers, Inc. (NASD) filed a complaint against petitioners, Whiteside & Company, a broker-dealer registered with the

*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F. 2d 409.

Securities and Exchange Commission (SEC) pursuant to Section 15(b) of the Securities Exchange Act, as amended, 15 U.S.C.A. § 78*o*(b), and a member of the NASD, and the firm's two partners, Clarence K. Whiteside and William H. Whiteside. The complaint alleged that petitioners, after computing the "Formula for Determination of Reserve Requirement for Brokers and Dealers" on a monthly basis pursuant to SEC Rule 15c3–3, 17 C.F.R. § 240.15c3–3, failed to make the necessary deposits to the "Special Reserve Bank Account for the Exclusive Benefit of Customers" and failed to notify the SEC, the Securities Investor Protection Corporation (SIPC), the NASD, and the Midwest Stock Exchange (MSE) of their failure to make the required deposits in violation of Article III, Section I of the Rules of Fair Practice [1] of the NASD.

Petitioners denied the allegations of the complaint and a hearing was held before the Conduct Committee. On February 7, 1975, the Conduct Committee issued a written decision finding violations and imposing a censure, a $1,000.00 fine and assessing costs. On appeal to the Board of Governors of NASD this decision was affirmed and the costs of the appeal were assessed against petitioners. Petitioners appealed to the SEC pursuant to Section 19(d) of the Securities Exchange Act, as amended, 15 U.S.C.A. § 78s(d). After argu-

[1] Article III, Section I of the NASD's Rules of Fair Practice requires that an NASD "member, in the conduct of his business shall observe high standards of commercial honor and just and equitable principles of trade."

ment and upon consideration of the record of proceedings before the NASD, the SEC affirmed the NASD's actions and dismissed the appeal. Upon petition for review pursuant to Section 25(a)(1) of the Securities Exchange Act, as amended, 15 U.S.C.A. § 78y(a)(1), we affirm.

Our review on this appeal is not *de novo* but limited by Section 25(a)(4) of the Securities Exchange Act, as amended, 15 U.S.C.A. § 78y(a)(4), which provides that "findings of the Commission as to the facts, if supported by substantial evidence, are conclusive." The SEC is the agency mandated by statute to review the imposition of disciplinary sanctions by self-regulatory organizations such as NASD, 15 U.S.C.A. § 78s(d), and we should not undermine its role by a grudging interpretation of the legislation. This is particularly important in an area of expertise as intricate as the securities field where public interest and public image are very important. Of course, we would be remiss if we simply deferred to the experts and did not insist that decisions be supported by substantial evidence.

The NASD found that computations as of January 31 and May 30, 1974, showed that deposits of approximately $11,000.00 and $14,000.00, respectively, were required to be made in a special reserve account but that no deposits in any amount were made. Petitioners did not contest the fact that no deposits were made, or notice given, but they asserted that "corrected computations" revealed that no deposits were

necessary. The NASD found that, even if petitioners' "corrected computations" were accepted, deposits to the reserve account would nevertheless have been required. Petitioners responded that this was so only because certain cash prepayments made by customers were incorrectly included as liabilities in the determination of the reserve requirement.

The NASD also found that petitioners failed to make a deposit of over $43,000.00, or give timely notice of their failure, as of June 30, 1974. Petitioners' computation of July 8, 1974, indicated that a deposit of over $50,000.000 was required. Instead, a re-computation was made on July 11, 1974, and a deposit of $22,282.22 was made to the special reserve account. Petitioners sought to excuse their failure to make a timely deposit on the basis that one partner was on vacation and a new girl failed to make the deposit. Petitioners also countered by asserting that the failure was cured by the later deposit and that, at any rate, they, in fact, had enough money to cover the deficiency. Finally, petitioners contended that the time lag in the transmission of information to them from the Midwest Clearing Corporation made compliance with the regulatory scheme impossible.

The SEC upheld the sanctions imposed on petitioners. In this regard, however, the SEC noted that this was the first case in which the provisions of Rule 15c3–3 had been interpreted and, therefore, the January and May instances would be excluded "from consideration in determining whether the sanctions

imposed by the NASD are excessive."[2] Thus, our review in this case is limited to the question of whether the SEC's decision that petitioners violated the Rules of Fair Procedure of the NASD is supported by substantial evidence and whether the SEC decision finding that the NASD sanctions were not excessive is arbitrary.[3]

There can be little dispute with the conclusion that petitioners violated Rule 15c3–3. Under the rule small firms, such as Whiteside & Company, are required to compute on a monthly basis their net aggregate indebtedness to customers as of the last business day of the month. Petitioners failed to do so. If the computation shows a net credit balance, the broker-dealer must make a deposit in a special reserve account which, when added to the existing balance in the account, will equal at least 105% of the total credit balance. While petitioners untimely com-

[2] The basis for excluding the January and May instances appears to be that the SEC felt that the regulations were ambiguous enough to render petitioners' exclusion of prepayments from customers in their computations excusable.

[3] Petitioners seem to urge several other points on this court. Most of them do not merit consideration here because they were not raised before the SEC. *See Unemployment Compensation Comm'n* v. *Aragan*, 329 U.S. 143, 67 S.Ct. 245, 91 L.Ed. 136 (1946); *Cotherman* v. *FTC*, 417 F. 2d 587 (5 Cir. 1969). Furthermore, many of those claims are so nebulous that we cannot determine precisely what the issue is, and cannot expect the SEC to do so. One issue, however, reached the SEC and should be addressed here. Petitioners allege that Rule 15c3–3(i) violates their rights against self-incrimination by compelling them to notify the SEC and other regulatory bodies of a failure timely to make a reserve deposit as required by Rule 15c3–3(e). This rule does not violate the petitioners' rights in this regard because 15c3–3 is regulatory, not penal. *See Sloan* v. *SEC*, 547 F. 2d 152 (2 Cir. 1976).

puted a new credit balance, they still failed to make the required deposit. A broker-dealer who fails to make a required deposit is immediately to notify the SEC, the SIPC and other regulatory bodies by telegram. Petitioners did not immediately notify anyone. The finding that petitioners violated SEC Rule 15c 3–3 and, consequently, NASD's Rules of Fair Practice, is clearly supported in the record by substantial evidence.[4]

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[4] One of petitioners' principal arguments, especially as concerns the January and March computations, would have the Commission rule that customers' cash prepayments for subsequent purchases by the broker are not liabilities to customers within the meaning of Rule 15c3–3. The Commission found that such prepayments were such liabilities:

"When applicants' customers tendered their checks, they parted with their money. Applicants' acceptance of those prepayments created liabilities to those customers as of the end of the months in question, and those liabilities were included within the rule's definition of 'other credit balances.'

"Applicants point out that the rule's definition of 'other credit balances,' under which category these prepayments should have been included in the computations, speaks of 'cash liabilities.' They argue that what was owed to these customers as of the end of the subject months was not cash but securities. This argument has some appeal because it is certainly true that the customers' bargains with applicants called for the purchase of securities. However, it is also true that, prior to settlement, applicants held customer funds for which applicants were clearly liable if the transactions were not consummated. Applicants' argument amounts to a semantic distinction which lacks merit in view of the clear import of Rule 15c3–3. Any ambiguity caused by the use of the term 'cash liabilities' in the definition of 'other credit balances' can be readily resolved by reference to Exhibit A to the rule which contains the formula for computing the reserve requirement and which makes it amply clear that 'customers' securities failed to receive' are to be treated as credit balances."

We agree with the Commission.

Section 19(e)(2) of the Securities Exchange Act, as amended, 15 U.S.C.A. § 78s(e)(2), provides in relevant portion that the SEC "may cancel, reduce, or require the remission" of a sanction imposed by the NASD only if it finds that the sanction "is excessive or oppressive." The SEC recognized in this case that the excuses expounded by petitioners were mitigating factors in the consideration of sanctions to be imposed. In light of the fundamental nature of the reserve account system to the safeguarding of customers' funds, however, the SEC concluded that the sanctions were appropriate. We cannot say that this conclusion was arbitrary or an abuse of discretion.

We AFFIRM.

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No. 77-917

In the Supreme Court of the United States

OCTOBER TERM, 1977

WHITESIDE & COMPANY, ET AL
Petitioners
v.
NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF TO
BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION
Opposition (March 1978)

NO BRIEF FROM NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

Petitioners
Whiteside & Company
Clarence K. Whiteside, Partner
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No. 77-917

In The Supreme Court of the United States
October Term 1977
Petition for a Writ of Certiorari For U.S. Fifth Circuit

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CITATIONS

(a) SEC, Rel. No. 9856, 15c 3-3 (e) (3); 15c 3-3 (g)
(b) SEC, Rel. No. 12656/June 22, 1976
(c) SEC, Rel. No. 12565/June 22, 1976
(d) SEC, Rel. No. 10756/April 26, 1974, page 2
(e) Fifth Circuit Court, No. 76-3318, page 5a (2) & (3)
(f) NASD Decision, Tx. 248 P. App. (g) and (h)
(g) Petitioners' Appendix (m) and (n)
(h) NASD Manual, Art. III, Sec. 1, Par. 2151
(i) NASD, Manual, Art. IV, Sec. 3, Par. 2203

HISTORY

1. On February 7, 1975, NASD District 6, Complaint No. Tex 248, rendered its Decision, with itself improperly as Complainant, against Petitioners with Penalties of fine, sanctions, censure and hearing costs (court functions) for alleged infractions of SEC Rule 15c 3-3 (e) (3). Petitioners' Appendix (i) - Decision: P. Appendix (h).

2. On September 22, 1975, NASD Board of Governors' Appeal, Decision affirmed the District Committee findings and assessed additional costs, and changed the basis of previous Decision. - P. Appendix (g).

3. With SEC Release No. 12656/June 22, 1976, SEC dismissed review proceedings, returning to the NASD, Board of Governors Decision, P. Appendix (p) - also public record of SEC Releases.

4. Accompanying the above, SEC Release No. 12565/ June 22, 1976 gave an opinion based on the record of proceedings before the NASD, plus a lengthy discussion as the "first interpretation of Rule 15c 3-3." - P. Appendix (o) - also public record of SEC Releases.

5. On August 18, 1977, the Fifth Circuit Court of Appeals, No. 76-3318, Summary Calendar, Per Curiam, pages 5235-5339 - P. Appendix (b) - in detail: Administration Office, U.S. Courts - West Publishing Company - Affirmed the order of the Securities and Exchange Commission which returned to NASD, Board of Governors Decision, Affirmed, based on the record of proceedings before the NASD..

6. By first amended motion, Petitioners asked of the Fifth Circuit relief of sanctions, fines and costs, and

awarding to Petitioners of reimbursement of reasonable costs on the grounds of improper decisions and responsibility plus faulty interpretation of the Rule 15c 3-3 (e) (3) and true facts surrounding the computation and Deposit **as of** June 30, 1974. We do not believe this motion has been properly acted upon.

RESTATEMENT OF THE PETITION FOR A WRIT OF CERTIORARI

A. 1. SEC Release No. 12565/June 22, 1976, Section 4, last paragraph, page 5 (34-12565) states the following: "This is the first case in which we have interpreted the provisions of Rule 15c 3-3." It is of national importance to thousands of security dealers, a most important industry, and the time of the U.S. Supreme Court is warranted.

2. The NASD Decisions were not supported by correct, "substantial and convincing evidence," evolved by adequate investigation, nor the wording of Rule 15c 3-3 (e) (3) and applications of the provisions of SEC Release No. 10756/April 26, 1974, page 2.

3. The SEC did not make independent investigation of the correctness of "substantial and convincing evidence," or properly intrepret the Rule 15c 3-3 or apply SEC Release No. 10756.

4. Fifth Circuit Court of Appeals did not make independent inquiry of the correctness of "substantial and convincing evidence," nor Rule 15c 3-3 and SEC Release No. 10756.

5. Who should make adequate inquiry?

B. 1. That Petitioner's Original Brief, timely filed December, 1977, called attention to sufficient

number of errors and misstatement of facts to indicate that Decisions were not made on the basis of correctness of "substantial and convincing evidence."

2. That, no reply brief has been filed by the National Association of Securities Dealers, Inc., a private corporation, the original complainant, to which SEC Release No. 12656/June 22, 1976 Dismissed Review Proceedings.

3. That brief for the Securities and Exchange Commission in opposition, March 1978 merely historically repeated a large number of incorrect statements negating the basis of "substantial and convincing evidence."

C. Petitioner's reply brief will list a large number of incorrect statements, not all inclusive, but sufficient to warrant an inquiry into "substantial and convincing evidence," plus the legal basis of the Complaint and Decisions in Argument.

FALSE STATEMENTS MADE

1. Formula Computations are not to be made **at** or **on** last day of month but **as of** the last business of the month like any Balance Sheet. NASD Decisions, affirmed SEC and Fifth Circuit.

2. Deposits of not less than 105 per centum of the amount computed are not to be made no later than one hour after opening of banking business on the second business day following (the last day of the month). The parenthesis signifies an improper addition. Time of deposit is tied to time of computation.

3. The requirement for the computation to be made between the last day and 10:00 a.m. 2nd day of the following month is **not correct.** Even, if so, it would be a negation of NASD Decisions. If the computation was made the first day of the month, deposit would be no later than 10:00 a.m. the third day; before 10:00 a.m. the 2nd, the deposit on the 4th day.

4. It is incorrect to state that telegraphic notices of no deposits before 10:00 a.m. the second day of following month were necessary after 10:00 a.m. that day and as a result, Respondents were in violation as charged by NASD. It is false and incorrect to state Respondents admitted their fault in not making timely deposits.

5. The ignoring of SEC Release No. 10756/April 26, 1974, page 2 in respect to data coming from the Midwest Clearing Corporation, a most important correspondent, is a gross mistake.

6. It is incorrect that only after the Association (Mr. Neal Jones) contacted Respondents on July 11, 1974 did they take action by making a subsequent computation and deposit - Mr. Neal Jones was conspicious by his absence from January 7, 1975 NASD hearing to confirm this conversation.

7. Respondents did not violate Article III, Section 1 of NASD manual by "acts contrary to high standards of commercial honor and just principles of trade." No trade was involved.

8. That ". . . even after Respondents were able to compute the reserve requirement . . . the additional required deposits were not even made" is false as Respondents did timely make the deposits on July 11, 1974. At least NASD recognized that the computation could not be made on June 30, 1974.

9. It is incorrect to charge willful and non-cooperative **attitude** that Respondent did not make deposit even though they had sufficient funds to make them. Attitude was the most important appeal by NASD to the SEC.

10. Respondents have no evidence that they were "cautioned" once by examiners and once by letter in 1973.

11. Charge that Respondents by its procedure of July 11, 1974, permitted the firm to use $43,793 to which it was not entitled during the early part of July is false as customer liabilities were paid during the lag period.

12. It is false that customer payments before due date is a customer cash liability or a fail to receive in formula, excused by SEC, confirmed by Fifth Circuit, Decision Aug. 18, 1977, pg. 5a (2).

13. It is false that customer payments before due dates are payments for purchases not made as stated in all Decisions.

14. It is false, accused by NASD Decisions that Whiteside Computations were made at or on June 30, 1974 and the last day of any month. (Actually made 7/09/74).

15. It is regrettable that SEC submitted to Fifth Circuit Court a brief with many misstatements of facts and an Appendix that was edited, abbreviated, manufactured and falsified from the true facts of this case.

16. Such a misquote as on page 9 of Opposition Brief, March 1978, quoting William Whiteside, who was not at the January 7, 1975 Hearing NASD Committee, that "we erred"; that is, in not making a deposit when the subject being discussed was the compo-

sition of the computations. Clarence was the one there and he recorded the meeting on a Compact Cassette.

17. The hearing before the SEC Commission is grossly misquoted, confirmed by Mrs. C. Whiteside who was in the audience, and in reply to our written inquiry for a copy of the record taken that day a staff person, via telephone conversation, informed us no record existed.

18. It is an error that excessive (more than 105%) is advisable, or required. In fact, the formula is so designed that a two to one cash ratio is required to cash customer liabilities - one dollar in Reserve Special Deposit and one dollar required on hand to liquidate cash customer liabilities before "retrieving" from the Special Deposit by subsequent computation.

19. Excuses and mitigating circumstances are grossly misstated and related as avoidance. Respondents have not avoided responsibility. Often our fault was listening to so much uninformed and incorrect advice. We do not claim to be experts on Rule 15c 3-3 and we have yet to meet the person who fully understands it.

20. As stated to the committee on January 7, 1975, Respondents do not understand the secrecy of its meeting, August 22, 1974, and others where our case was discussed. Also the withholding of Littlepage and Watkins Examination Reports, and those since, in view of the Freedom of Information Acts. (This is still going on).

21. Staff computations incorrectly included proprietary accounts and others.

22. A broker cannot be placed in an option position in respect to Cash Payments before due date from the customer - cash or securities for purchase already made, setting the due date by regulations. Money is going to the other broker and it was proven to have been done by testimony to NASD District Committee including copies of confirmations. These payments were in "end of month balance sheets" - having been recorded.

23. This is the first case in which the SEC has interpreted the provisions of Rule 15 c 3-3. What about equal notice to Respondents? Making the Rule, interpreting the Rule, enforcing the Rule is too much for any Agency and Commission.

24. Can Respondents operate its home office in Lubbock and abide by NASD and SEC interpretations, to make deposits before their amounts can be computed, to put extra burdensome restrictions on some for the benefit of others, to restrain trade? Surely Congress does not agree with these interpretations which are contrary to the wording of the Rule. Can anyone explain Notes A & B of Formula? Or why Margin Accounts are more valuable than cash which is not in Formula?

25. Without investigation by either SEC or Fifth Circuit of essential facts Decisions are "ditto" related, oblivious to Petitioners' Briefs and Appendices to the contrary.

ARGUMENT

1. Since the SEC dismissed Petitioner's appeal, SEC Release No. 12656/June 22, 1976, thus returning this matter to the National Association of Securities Dealers, Inc., a private corporation, the petition to the Fifth Circuit Court of Appeals and petition for a Writ of Certiorari from the U.S. Supreme Court to the Fifth Circuit Court were directed to NASD, which gave no Reply Brief to Fifth Circuit or the Petitioners for a Writ of Certiorari.

2. The request for a Writ of Certiorari is based primarily on (a) presentations to Fifth Circuit containing numerous misstatements of facts, (b) an appendix of record, edited and abbreviated, in many instances, manufactured and misleading, (c) misinterpreted for that Court the actual wording of the Rule 15c 3-3 (e) (3), (d) very importantly ignored SEC Release No. 10756 and Rule 15c 3-3 (g) as applying to Petitioners, and (e) improperly endorsed the Complaint Procedure of NASD and its assumed Court functioning in respect to penalties, which even the SEC did not have in respect to Rule 15c 3-3.

3. NASD did not present a brief to Fifth Circuit and has not presented a Brief in respect to the request for a Writ of Certiorari. A Brief from the SEC in opposition to the latter is recognized.

4. In 1974, during the NASD alleged violations, NASD was not the regulatory authority charged with the task of examining Petitioner's financial responsibility, and therefore not subject of Notice of Failure, Rule 15c 3-3 (i) regardless of SEC statement (opposition - argument 2nd paragraph, page 8, March 1978) to wit: ". . . that notice of their failure to make the

necessary deposit had not been given to the NASD," for as of June 30, 1974 computation.

5. NASD was not empowered to file the complaint against petitioners.

   (a.) Firstly, NASD was not the "regulatory authority charged with the task of examining Petitioner's responsibility" - Midwest Stock Exchange was that authority.

   (b.) NASD requirement of its Form "M" report has never been authenticated.

   (c.) Even NASD's Manual does not authorize its Committee to file such a complaint as Tex No. 248.

      (1) Its Rules of Fair Practice, Article III, Section 1, and "Code of Procedure" is for handling trade practice complaints - the "Business Conduct of Members." Rule 15c 3-3 is not a trade practice Rule, but an internal, comingling, setting aside a general reserve in respect to alleged customer liabilities.

      (2) Complaints of trade practice alleged infractions must be made by individual (person), public or member, customer or broker, request of a member.

      (3) Complaints by District Business Conduct Committee "shall be handled in accordance with the Code of Procedure and in the same manner as if had been filed by an individual or member." No individual or member has been identified as making a complaint on Petitioners, nor what individual has been aggrieved on account of Petitioner neces-

sitating a Business Conduct Committee Complaint. (Article IV, Section 3, paragraph 2203, NASD Manual). The complaint is not autorized by NASD Manual.

(4) Furthermore, Code of Trade Practice Complaints, Paragraph 3022, Section 23 NASD Manual provides "No member of the Board of Governors, or any District Business Conduct Committee or any Local Business Conduct Committee shall in any manner, directly or indirectly, participate in the determination of any complaint affecting his interest or the interest of any person in whom he is directly or indirectly interested."

Thus, any direct competitor had an interest at least indirectly in Hearing Tex 248; at least three out of four were direct competitors and were ineligible.

6. NASD's Manual Provision for Penalties, which are far reaching encroachments on a person's personal and professional rights, are illegal invasions of Court responsibilities.

(a.) Webster's definition of a penalty is as follows: "The suffering in person and property which is annexed by law or judicial decision to the commission of a crime, offense, or trespass, as a punishment; penal retribution."

Since Rule 15c 3-3 is regulatory and not penal - per curiam, August 18, 1977, decision of Fifth Circuit Court of Appeals, page 5a (3) - penalties cannot be applied by NASD.

Article V, Section 1, paragraph 2301, NASD Manual does not provide as a penalty the assess -

ment of "costs" and is not definite in the "and/or" assessment of censure, up to $5,000 fine etc." What does "and/or" mean?

7. The NASD Decision, February 7 1975 besides being indefinite, violates numerous SEC Rules and Releases:

(a.) NASD has no authority to make computations of Formula for rule 15c 3-3, that responsibility was the Petitioner's, including statement of deposit required. Petitioners made these computations when data was available to do so (as per SEC Release No. 10756/April 26, 1974, page 2) as follows:

Whiteside Computation

As of Date	Comp. Date	Dep. Bal.	Dep. Req.
1/31/74	2/04/74	$36,622.04	None
5/31/74	6/07/74	9,436.38	None
6/30/74	7/09/74	9,061.91	$37,923.56

MCC Reports received 7/08/74 and posted as per SEC Release No. 10756 (so confused was MCC during this period that cash figures were not even available via telephone.)

After correctly stating SEC Rule 15c 3-3 (e) (3) page 15, computation **as of** the close of the last business day of month it moved Petitioner's back to **June 30, 1974** and was not only an error but a misstatement of the Rule. Under no circumstances could the computation be made at June 30, 1974, before the close of the month and day, and was not Rule 15c 3-3 required. If computation was meant to be **at** then why does it not so state?

(b.) The NASD has tried to add illogically "after the end of month" to the following: " . . .

if a deposit is required that it be made no later than one hour after opening of banking business on the second following day (after the end of the month.)" After the end of the month is simply not in the Rule and was added for Complaint and Decision basis.

The NASD is not very certain in its Decision about deposit requirement: "Respondents failed to take appropriate steps after its initial computation **at** June 30, 1974" (not made at June 30, 1974). Later stating ". . . even after Respondents were able to compute the reserve requirement." (as shown in 7. (a) above ". . . the additional deposits were not even made." But the necessary deposit was made July 11, 1974 jointly in connection with a withdrawal computation. A simplification of this procedure would have been to deposit $37,923.56 then even date a check out of the Account $15,695,34, leaving a net addition to the account of $22,228.22. The deposit **as of** June 30, 1974 was made. Evidently, NASD does not recognize withdrawal computations as the one **as of** July 10, 1974, Rule 15c 3-3 (g), page 16.

(c.) Alleged "cautions", not proven, were possibly in 1973, not 1974, when Respondents were trying with difficulty to establish a "Special Reserve Account for Benefit of Customers" (our bank's attorney still wants to know what customer the bank is liable to - a good question).

(d.) Penalties and alleged violations of "equitable principles of trade" have already been discussed above. Assessment of costs is not authenticated, neither penalties - a court function.

8. The deviation of all levels is appalling.

   (a.) NASD District avers responsibility - only doing what SEC requests and that computations were made **at** or **on** closing day of month, which is in error.

   (b.) NASD Board of Governors cannot overcome the District Committee but did assert Petitioner's responsibility to keep "in house" whatever books necessary, irrespective of stock exchange clearing activity reports, which is incorrect - even not recognized in SEC Release No. 12565, June 22, 1976.

   (c.) SEC states MCC Activity Reports are necessary but Petitioner "could get them faster" which was not possible nor the responsiblity of Petitioners. SEC Release No. 10756/April 26, 1974, page 2, ignored as applying to Petitioners, which is incorrect.

   (d.) Fifth Circuit denied "expertise" and merely endorsed the SEC Brief and opinion without inquiry.

   (e.) Without investigation and inquiry, the SEC denied appeal and returned to the NASD an obvious negation of the facts involved which is emphatically deplored.

9. The NASD Decision, September 22, 1975, though as customary in these Administration Hearings, had an "addition" not previously discussed or complained, that MCC data was not necessary for Respondents Computations and Compliance - that "in house" books were sufficient.

   (a.) That the MCC was an extraneous bookkeeping service is a new concept.

(b.) That Respondent should have its home office in Chicago for bookeeping is a "veiled" requirement.

(c.) That SEC Release No. 10756 is not available for Respondents transmissions from Chicago to Lubbock but available to another broker for branch data from Lubbock to Chicago is decidedly discrimatory, if so.

(d.) That, electronic posting was available in 1974 from MCC - Respondents could have gotten MCC Data faster (SEC Release No. 12565/June 22, 1976, Section IV, 10) "Applicants have the responsbility of keeping their records current" - "A number of out-of-town members of the Midwest use telecopier facilities, private express delivery, or telephonic communication with an agent in Chicago "Yet" reliance on outside services does not relieve them of that responsibility."

(e.) If the above is true, why SEC Release No. 10756 "Lag in transmission of data" necessary? Electronic original entry posting is not quite here in 1978 much less 1974.

10. "When unable to meet the deadline (for deposit) applicants are under a duty to notify us (i.e. Rule 15c 3-3 (i), to notify the Commission, SIPC and the regulatory authority for the broker-dealer - P. Appendix (j) page 16) as required by the rule." (SEC Brief in opposition, March 1978).

(a.) NASD Decisions would have you believe that the **"deadline"** for computations **at** the last day of the month - June 30, 1974 and for deposit by 10:00 a.m. 2nd hour after bank opening following the end of month, July 2, 1974.

(b.) Not only are these not possible, which regardless cannot be demanded, but the **"deadline"** is not at end of month for computation but **as of** end of month, whenever that is possible, and deposit by 10:00 a.m. the second following business day (after end of month) is not the deadline.

(c.) **These Decisions are not according to Rule 15c 3-3 (e) (3) but according to a false interpretation of the Rule from as of to at or on and more importantly, adding to the end "the second following business day" the words "of the month" which is false - a decision not according to the Rule 15c 3-3 (e) (3).**

11. "The basis for excluding the January instances appears to be that the SEC felt that the regulations were ambiguous enough to render petitioners' exclusion of prepayments from customers in their computations excusable. No deposits were therefore required for January 30 and May 31 and further discussion about them is not applicable." Fifth Circuit Decision, August 8, 1977, page 5a, (2).

SUMMARY OF ARGUMENT

Petitioners need an impartial vehicle, free to decide the true facts of this case and exact meanings of the SEC Releases involved.

1. SEC Release No. 9856, Rule 15c 3-3 (e) (3) page 15 provides for **as of** close of month computations, not **at** close of month as NASD decisions have been. Like an **as of** balance sheet, **as of** clearly means when applicable data is available and computable. Formula computations, complicated and time con-

suming, are necessarily made for determining, if any, deposit to a Special Reserve Account which is required no later than one hour after the opening of banking business on the second following business day. The NASD decisions and SEC have improperly added to the above - **following business day** the following words: "following the last business day of the month." This simply is not in the Rule as likewise **at** instead **as of.**

2. Petitioner's did not make computation **at** June 30, 1974, or any other **at** close of a month, could not have made and was not Rule required to make. P. Appendix (h) A8 - However A9 same Appendix (h), NASD, February 7, 1975, Decision, recognized the necessary later **as of** computation: " . . . after Respondents were **able** to compute the reserve requirement."
3. Petitioners were falsely accused in NASD Decision P. Appendix (h) A8: "Respondents failed to take appropriate steps?" We assume it is a deposit.)

   ". . . after Respondents were able to compute (actually July 9, 1974, as of June 30th) the reserve requirement . . . the additionally required deposits were not even made" is false as **Petitioners did make timely the deposit** July 11, 1974 - $37,923.56 as of June 30 less withdrawal of $15,695.34 as of July 10 to make a net deposit of $22,282.22 - P. Appendix (m) and (n).

4. SEC Release No. 10756/April 26, 1974, page 2 - "Time Lag in Transmission of Data", P. Appendix (k), is ignored in all NASD Decisions and later SEC "supporting briefs". Data from Midwest Clearing Corporation (MCC) is a most essential correspondent. SEC Release No. 10756 provided such data "be recorded no later than the day after the transaction is reported to the accounting department." MCC data, via Air Mail, for the close of month, June 30, 1974, arrived at Lubbock Post Office Saturday, July 6th, because like July 4, June 29 and 30th, July 6 and 7 were holidays which were extremely troublesome for MCC operation and Air Mail transportation. No computation at June 30, 1974, or any other end of month, can be made in view of these "excused" delays as provided by this SEC Release No. 10756.

5. If any alleged Rule 15c 3-3 (e) (3) violations are to be made the subject of a complaint, the complainant should have been Midwest Stock Exchange, which examined petition member as to financial responsibility, not NASD which did not have that responsibility, or the SEC or SIPC to whom any deposit infractions must be reported. NASD improperly was the complainant. Since this is Regulatory and not Penal, as stated by Fifth Circuit, page 5 a (3) last sentence, MSE, SEC, or SIPC, wisely do not have penalty powers - such as sanctions of censure, fines, etc., the SEC turned to NASD which it thought possibly does have penalty power.
6. NASD, a private corporation, does not legally have penalty powers. "The term 'penalty' in its broad sense, is a generic term which includes fines as well as other kinds of punishment, but in its narrowest sense, is the amount recovered for violation of the statute law . . ." Black's Law Dictionary. Penalty is a court responsibility, not an administrative one.
7. NASD Manual does not give its District Committees power as a complainant except for "an individual or member" for which it might act in its Code of Com-

plaint Procedure as if the Complaint had been filed by "an individual or member." What individual or member is involved in Tex No. 248 Complaint? **None.**

8. Additionally, NASD "Penalty" for violation of Article III, Rules of Fair Practice, Business Conduct of Members, refers to "trade conduct" - "shall observe high standards of commercial honor and just and equitable principles of trade." Rule 15c 3-3 (e) (3) is a regulation of setting aside a co-mingled, Special Reserve Bank Account for the benefit of customers, not identified, and does not involve a trade. This has no place in this case.

9. Repeated statements have been incorrectly made as to Petitioner's admission of "failure to deposit - none has been verified in substance or confronted in any hearing. P. 9, SEC Brief, March 1978 infers that William Whiteside testified January 7, 1975 in Dallas NASD Hearing: 'Now, yes we erred. I am not going to tell you we didn't err . . .", is incorrect. In the first place, William was not present there. Clarence K. Whiteside never made such a statement, even though there was some discussion as to completeness of computations such as including proprietory accounts which are errors that could only be alluded to. Strangely, Clarence K. Whiteside, who cassette recorded that hearing, could not find such a statement in replay of the recording.

10. The withholding from Petitioners of copies of Examination Reports and confidential meetings of District Committee, all of which Petitioners feel are infractions of the Freedom of Information Acts and has placed Petitioners to a disadvantage of what facts and Rules are being considered in Decision making not covered in so called hearings, where

nothing is subject to being proven as would be in a court procedure.

11. Since January and May, 1974 deposits were excused (Argument Item 11 above) they are not subject to further discussion.

12. These Decisions are not according to the wording of Rule 15c 3-3 (e) (3) in respect to alleged violations surrounding the **as of** computation for June 30, 1974 and the deposit which was timely made July 11, 1974.

13. The question is that Petitioner's need to be impartially heard on the basis of "substantial and convincing evidence."

CONCLUSION

1. Computations and Deposit alleged violations, if any, connected with Jan. 31 and May 31, 1974 were excused by the Securities and Exchange Commission. SEC Release No. 12565 and Fifth Circuit Per Curiam.

2. The facts relating to Computation and Deposit related to June 30, 1974 as given by NASD Decision, Tex No. 248, February 7, 1975, were incorrectly stated. Computation was not **at** June 30, 1974 but **as of** that day made on July 9, 1974 "when Petitioners were able to do" so properly and Deposit was timely made on July 11, 1974.

3. Interpretation of Rule 15c 3-3 (e) (3) was improperly made.

4. Furthermore, NASD was not accounting responsibility of Petitioners and therefore did not have Complaint authority.

5. NASD Manual does not give its District Committee authority of Complaint except performing for an individual or a member.

6. Assessment of Penalties, a Court procedure, was illegally made without authority NASD.

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